

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

28456

FILE: B-213726

DATE: June 6, 1984

MATTER OF: System Development Corporation

DIGEST:

1. A federal holiday is not considered a working day for computing timeliness under our Bid Protest Procedures. Therefore, a protest allegedly filed untimely on the 11th working day, where our procedures require filing of a protest within 10 working days, is not untimely where one of the days in question is a federal holiday.
2. Protest is sustained where agency has not justified award to higher priced, technically superior offeror whose price is \$4 million more than a technically acceptable offeror whose technical score was only slightly lower than awardee's. Even where cost is stated in the evaluation criteria to be of less importance than technical factors, cost must still be accorded some consideration, and record here does not indicate cost was properly considered.

System Development Corporation (SDC) protests the award of a cost-plus-fixed-fee contract to Computer Sciences Corporation (CSC) under a request for proposals (RFP) No. MDA903-83-R-0040, for the acquisition of general engineering support for the accelerated development of the Joint Deployment System, issued by the Department of the Army (Army). SDC, which offered the lowest cost, technically acceptable proposal, protests the award to CSC, the highest cost, highest ranked technically acceptable offeror, on the grounds that the Army failed to consider cost in its evaluation and that the award without regard to cost was unjustified. SDC also contends that CSC's proposal should have been rejected because its proposal for staff months in option years 3, 4 and 5 was in excess of the ceiling established in the RFP and the RFP advised that staff months in excess of the RFP limits would exceed the technical scope of the contract.

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We sustain the protest on the grounds that the Army has not justified the award to CSC.

Initially, the Army argues SDC's protest is untimely because the protest allegedly was not filed within the 10 working days from the date SDC received notice that its protest to the agency was denied as required under 4 C.F.R. § 21.2(b)(2) (1983). SDC received notice of the contracting officer's denial of its protest on November 2, 1983, and SDC filed its protest with GAO on November 17, 1983. Since November 11, 1983, was a federal holiday, the protest was timely filed within 10 working days. See, e.g., Mutual of Omaha Insurance Company, B-201710, January 4, 1982, 82-1 CPD 2.

The Army assertion that SDC did not diligently pursue its protest because it did not file with GAO until 4 months after award is without merit. The record shows SDC filed a timely protest to the agency on August 1, 1983, and a timely supplemental protest based on information from its debriefing on September 8, 1983. Under our Bid Protest Procedures, SDC properly could wait a reasonable time for a response to its protests to the agency prior to filing with GAO. This was the case here and the subsequent protest to GAO was filed timely after the Army's denial of SDC's agency protest.

This RFP provided that an award would be made to the offeror with the best overall response, which was "defined as superior technically with realistic estimated cost." The RFP also stated that proposed costs would not be assigned numerical weights and would be subordinate to technical considerations. Finally, by amendment, the agency incorporated into the RFP a further explanation in response to a question raised at the preproposal conference:

"Individual items of technical proposal are given points . . . Costs are not assigned 'points' or numerical weights. Selection will be based on technical proposals cost being a consideration."

After submission of best and final offers, the technical evaluation panel (TEP) ranked CSC's proposal fully acceptable and SDC's and two other offerors' proposals as acceptable. The TEP unanimously ranked CSC as its first

choice. A cost evaluation was performed on CSC's proposal for the contract and option years to determine cost realism. The contracting officer accepted the TEP recommendation specifically finding that CSC should receive the award because its offer was technically superior and its proposed costs found reasonable for the required effort. CSC's offer was scored 8 points higher technically than SDC's proposal. (Proposals were scored on a scale of 100 possible points.) CSC's proposed cost of approximately \$11 million is \$4 million higher than SDC's offer of approximately \$7 million.

The protester's basic complaint is that it should have received the award because its proposal was evaluated at a substantially lower cost than CSC's.

In a negotiated procurement, award selection properly may consider factors other than price--for example technical superiority. See Automated Systems Corporation, B-184835, February 23, 1976, 76-1 CPD 124. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. The determining element is the considered judgment of the procuring agency concerning the significance of the difference in technical merit among the offerors. Columbia Research Corporation, 61 Comp. Gen. 194 (1982), 82-1 CPD 8. This Office will question that judgment only upon a clear showing of unreasonableness. American Coalition of Citizens with Disabilities, Inc., B-205191, April 6, 1982, 82-1 CPD 318.

Moreover, it is well settled that if a lower priced, lower scored offer meets the government's needs, acceptance of a higher priced, higher scored offer should be supported by a specific determination that the technical superiority of the higher priced offer warrants the additional cost involved. See Frank E. Basil, Inc.; Jets Services, Inc., B-208133, January 25, 1983, 83-1 CPD 91; Automated Systems Corporation, *supra*. The determination should document factors which the source selection official deems justify paying the price premium.

While we recognize that the record does indicate that the TEP determined CSC's proposal to be better technically than SDC's, the record contains no justification for paying

\$4 million more for a proposal only slightly better than SDC's technically acceptable proposal. In fact, the record indicates that the Army made its award determination without considering cost.

The contracting officer takes the position that the technical superiority of the awardee's proposal was such that there was no reason to consider the cost differential. Specifically, he asserts that:

" . . . where clearly defined criteria exist for evaluation and those criteria do not assign numerical weight to the overall cost of the proposal for evaluation, it need not be determined that the technical merits of the offer justify the additional expenditure."

This statement is incorrect and contrary to law; specifically, 10 U.S.C. § 2304(g) (1982) requires that cost must be accorded some consideration in negotiated procurements, even where cost or price is stated in the evaluation criteria to be of lesser importance than other evaluation criteria. Thus, we do not believe that the Army had a reasonable basis for its decision to award to CSC. See Metric Systems Corporation; Command, Control and Communications Corporation, B-210218, B-210218.2, September 30, 1983, 83-2 CPD 394.

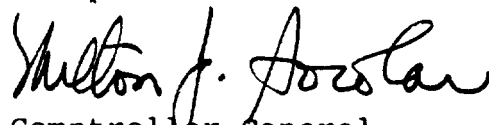
We further note that there is nothing in the record to show that SDC's proposed costs were understated or unrealistic. Thus, it appears that the Army essentially ignored cost as a factor, and awarded to the higher priced, higher technically scored offeror without justification. In the absence of any explanation supporting the award to CSC at the higher cost, we sustain SDC's protest.

Since we sustain the protest on this issue, and find the award improper, we need not consider SDC's other basis of protest concerning the technical acceptability of CSC's proposal.

We recommend that the Army conduct a cost realism study of SDC's proposed cost. If SDC's proposed costs are determined realistic, the Army should consider the feasibility of terminating its contract with CSC and awarding the remainder of the contract to SDC.

Since our decision contains a recommendation for corrective action, we have furnished copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to those committees concerning the action taken with respect to our recommendation.

By separate letter of today, we are also notifying the Secretary of the Army of our recommendation and his obligations under section 236.

for 
Comptroller General
of the United States